

General Information Letter: Activities related to the sale and delivery of farm products in Illinois by nonresident go beyond activities protected by Public Law 86-272.

January 23, 2001

Dear:

This is in response to your letter dated October 30, 2000 in which you state the following:

Please provide a general information letter to assist in apportioning income to Illinois. The reference 35 ILCS 5/304 includes (a) which states in part: "If a person other than a resident derives business income from this State and one or more other states, then ... such person's business income shall be apportioned ..." Nexus would need to involve a physical presence in Illinois for an unincorporated Indiana farmer having no associations with Illinois other than sales to a purchaser located in Illinois. Section 304 provides in (a)(3)(B): "Sales of tangible personal property are in this State if: (I) The property is delivered or shipped to a purchaser, other than the United States government, within this State regardless of the f.o.b. point or other conditions of the sale;"

Considering the farmer's grain, hay, livestock, etc. to be tangible personal property, would nexus exist if the Illinois buyer brought his trucks to the field of the Indiana farmer to pick up the grain, etc.? Would nexus exist if the Indiana farmer hired a third party to haul his grain, etc. to the Illinois purchaser? Would nexus exist if the Indiana farmer used his own truck to haul his grain, etc. to the Illinois purchaser?

Does a "yes" answer to any of the three previous questions mean there is a sales factor for the Illinois apportionment?

Pursuant to your request, we are responding with a general information letter ("GIL"). As you may know, GILs are designed to provide background information on specific topics, but are not binding on the Department.

The determination of whether a taxpayer has nexus with Illinois is extremely fact-specific. Such a determination can only be made in the context of an audit where a Department auditor has access to all relevant facts and information. However, we can provide general information regarding income tax nexus with the State.

Section 201 of the Illinois Income Tax Act ("IITA"), 35 ILCS 5/101 et seq, imposes a tax measured by net income on corporations for the privilege of earning or receiving income in this State. The Due Process and Commerce Clauses of the Federal Constitution limit the power of States to subject foreign corporations to tax. The Due Process Clause requires that there exist some minimum connection between a state and the person, property, or transaction it seeks to tax (Quill Corp. v. North Dakota, 504 U.S. 298, 112 S.Ct. 1904 (1992)). Similarly, the Commerce Clause requires that the tax be applied to an activity with a substantial nexus with the taxing state. Id.

Unless protected by Public Law 86-272, a foreign corporation has the requisite nexus to subject it to Illinois income tax where any part of its income is allocable to Illinois in accordance with the provisions of Article 3 of the Illinois Income Tax Act (35 ILCS 5/301-304, 308). The facts as stated in your letter indicate that the farmer in Indiana is receiving part of its income from Illinois on the basis

that it is selling grain, hay, livestock, etc. to an Illinois resident. As you mentioned in your letter, Illinois law provides gross receipts from sales of tangible personal property are allocable to Illinois if the property is delivered or shipped to a purchaser within this state regardless of the f.o.b. point or other conditions of sale.

Enclosed please find a copy of the Illinois Income Tax Regulation, 86 Ill. Adm. Code 100.3370(c)(1), specifically on point. From the examples listed in the enclosed regulation, and based on the information in your letter, the Indiana farmer may very well have nexus sufficient to subject him or her to Illinois income tax regardless of how the property is shipped to Illinois.

As a result, there would be a sales factor for the Illinois apportionment. Please note that Illinois has used the 3-factor apportionment formula that takes into consideration the (1) payroll, (2) property and (3) sales of a corporation. However, beginning with taxable years ending December 31, 2000, only the sales factor will be used. This change to a "single-sales factor" will be phased in over a two-year period. Since the Indiana farmer has no payroll or property within Illinois, the change does not effect your client.

As stated above, this is a general information letter which does not constitute a statement of policy that either applies, interprets or prescribes tax law. It is not binding on the Department.

Sincerely,

Heidi S. Scott  
Staff Attorney – Income Tax